IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	**No. 2001 Misc. 4**
IN RE THE MATTERS OF:	)	
AARON PATTERSON,	)	**86 CR 6091**
STANLEY HOWARD,	)	**84 C 13134**
DERRICK KING,	)	**80 I 1916**
LEROY ORANGE,	)	**84 C 667**
RONALD KITCHEN,	)	**88 CR 15409**
CORTEZ BROWN,	)	**90 CR 23997**
GRAYLAND JOHNSON,	)	**88 CR 7047**
ALONZO SMITH,	)	**83 C 769**
ERIC CAINE,	)	**86 CR 6091**
EDGAR HOPE,	)	**82 CR 1179/82 CR 1181**
ALTON LOGAN, and	)	**92 CR 7265**
CLARENCE TROTTER,	)	**86 CR 10969**
Petitioners,	)	
v.	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

On April 24, 2002, this court appointed retired Appellate Court Justice Edward J. Egan as Special Prosecutor and Robert D. Boyle as Assistant Special Prosecutor. (*In re Appointment of Special Prosecutor,* No. 2001 Misc. 4, April 24, 2002). The Special Prosecutors were ordered to investigate numerous allegations of police misconduct against Jon Burge or police officers under his command at Area 2 and later Area 3

headquarters in the City of Chicago during the period from 1973 to the present ("Area 2 cases"). *Id.*

Following this court's April 24, 2002 ruling, Cook County State's Attorney Richard A. Devine ("the State") filed a Motion for Clarification. The Motion for Clarification contained an admission, two announcements, and a question. The admission – by making Burge a potential target of the appointed Special Prosecutor, this court's order gave Burge a limited, but real interest in any Area 2 post-conviction proceeding which might still go to an evidentiary hearing and require Burge's testimony. (*Resp't's Mot. for Clarification of the Court's April 24, 2002 Order, May 22, 2002* at 4, 6; *Resp't's Reply to Pet.'s Resp. to the Mot. for Clarification, Nov. 6, 2002* at 9).

The first announcement – the State's Attorney "recused himself from all cases involving Burge Defendants, as well as any which might arise in the future through clemency, habeus corpus, or other post-conviction proceedings. The State's Attorney has assigned Assistant State's Attorney Patrick Driscoll to stand in his stead and exercise full powers in the supervision of all Burge Defendant cases." (*Resp't's Mot. for Clarification* at 4). The second announcement – the State contacted the Attorney General of Illinois and "asked [the office] to be prepared to undertake the supervision of these prosecutions pursuant to the Attorney General's duty under 55 ILCS 205/4 to consult with the State's Attorney and, when 'the interest of the state requires,...attend the trial of any party accused of crime, and assist in the prosecution....'" (*Resp't's Mot. for Clarification* at 5 (*citing* 55 ILCS 205/4)).

Finally, the State asked this court the following question, the answer to which is the clarification sought: what impact does the April 24, 2002 order have on present and

future cases involving Burge Defendants, as distinct from Burge and Burge-commanded detectives? *See Id.* at 6.

In response to the State's Motion for Clarification, twelve defendants[1] along with several public interest groups ("Petitioners") request that this court take two actions. First, in addition to the Special Prosecutors appointed by this court on April 24, 2002 to handle the investigation of alleged crimes committed by Area 2 investigators, Petitioners ask that this court appoint another Special State's Attorney to "act on behalf of the People of the State of Illinois in Petitioners' pending cases." (*Pet. and Mem. in Supp. of Pet. for Appointment of an Independent Special Prosecutor and Resp. to Mot. for Clarification, July 22, 2002* at 1). Second, Petitioners request their cases be reassigned to judges outside of Cook County. In response to Petitioners' two requests, the State filed a motion to dismiss and a motion for judgment on the pleadings.

In addition, the State argues the twelve defendant petitioners are not interveners within the meaning of the Civil Practice Act and should be dismissed. (*Resp't's Alternative Mot. to Dismiss and for J. on the Pleadings and Argument in Resp. to Def. Pet'rs' Pet. for a Special State's Att'y in Their Own Proceedings, Nov. 6, 2002* at 6-9). The State requests dismissal for three reasons: 1) Petitioners did not demonstrate, in writing, why intervention is necessary to protect their rights; 2) Petitioners do not possess an enforceable or recognizable right upon which their intervention is based; and 3) Petitioners' intervention was untimely. *Id.*

[1] Former Governor Ryan pardoned Aaron Patterson, Leroy Orange, and Stanley Howard. However, they remain parties to the Petition for the Appointment of a Special State's Attorney as private citizens.

The State and Petitioners present three items for ruling: 1) the State's Motion for Clarification; 2) Petitioners' request for appointment of a Special State's Attorney to litigate Petitioners' cases; and 3) Petitioners' request that their cases be reassigned to judges outside of Cook County.

While three issues have been presented to this court, the State's Motion for Clarification and Petitioners' Request for Appointment of a Special State's Attorney merge. Therefore, two issues will be decided by this order: 1) whether or not a second Special State's Attorney will be appointed to litigate Petitioners' cases; and 2) whether or not Petitioners' cases will be reassigned to judges outside of Cook County.

I. Request for Appointment of a Special State's Attorney

A. Background

1. Ethical Rules

First, Petitioners argue three provisions of the Illinois Supreme Court Rules of Professional Conduct ("IRPC") require the appointment of a Special State's Attorney. (*Pet. and Resp. to Mot. for Clarification* at 41). Specifically, Petitioners contend the State's Attorney cannot fulfill his duties under sections 1.7 ("Rule 1.7"), 1.9 ("Rule 1.9"), and 3.8 ("Rule 3.8") of the IRPC.

The State's Attorney violates Rule 3.8, Petitioners reason, because duties arising out of his attorney-client relationship with Burge conflict with interests of justice. Rule 3.8(a) announces the duty of a prosecutor is to "seek justice, not merely to convict." Ill. Sup. Ct. R. Prof'l Conduct 3.8 (2002). Petitioners attempt to prove violations of the rule by first citing the State's admission that Burge possesses a "collateral, but real, interest in

the proceedings" involving Petitioners and "now may be regarded as having a personal stake, or being a 'party'" in Petitioners' cases. (*Resp't's Mot. for Clarification* at 4, 6). The State's Attorney, Petitioners argue, serves two masters: justice and the interests of a former client. This is impermissible because "the State's Attorney's obligation to evaluate Petitioners' cases without bias is powerfully inhibited by his attention to the interests of his former clients." (*Pet. and Resp. to Mot. for Clarification* at 44). Petitioners believe the State's Attorney's special duty as a prosecutor to disclose information favorable to Petitioners conflicts with his continuing duty of confidentiality to Burge.[2] (*Pet. and Resp. to Mot. for Clarification* at 44).

Second, Petitioners contend Mr. Devine's actions since being elected State's Attorney "may" constitute a violation of Rule 3.8. (*Pet. and Resp. to Mot. for Clarification* at 46). Instead of seeking justice in every individual case, as Rule 3.8 requires, Petitioners accuse the State's Attorney of doing "everything in his power to prevent Petitioners' claims from being adjudicated." *Id.* at 47.

Petitioners also argue the State's Attorney cannot fulfill his duties under Rule 1.7 and Rule 1.9 of the IRPC. (*Pet. and Resp. to Mot. for Clarification* at 7). Rule 1.7 prohibits any lawyer from representing a client if the representation of that client may be "materially limited by the lawyer's responsibilities to another client or third person." Ill. Sup. Ct. R. Prof'l Conduct, R 1.7 (2002). Rule 1.9 prohibits a lawyer who formerly represented a client from representing "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a

[2] See Rule 3.8 and *Brady v. Maryland*, 373 U.S. 83, 87 (1963)(due process requires prosecutor to disclose material evidence favorable to accused upon request).

former client." The substance of the ethical violations is the same as alleged with respect to Rule 3.8. Only the ethical rules have changed. Petitioners again assert that Mr. Devine's former representation of Burge makes him less than fair and impartial in relationship to Petitioners' cases. Therefore, Mr. Devine's ability to fairly represent the State, his current client, and protect the interests of Burge, his former client, is limited in violation of Rule 1.7 and Rule 1.9. (*Pet. and Resp. to Mot. for Clarification* at 48).

The State argues Petitioners apply the wrong ethical rules. The relevant ethical rule is IRPC 1.11 ("Rule 1.11"), which governs conflicts arising when an attorney moves from private to public law practice. (*Resp't's Alternative Mot. and Resp. to Pet.* at 20). The rule reads:

> (c) Except as otherwise expressly permitted by law, a lawyer serving as a public officer or employee shall not:
>
> > (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter...

Ill. Sup. Ct. R Prof'l Conduct, R. 1.11(c)(1) (2002). The State argues the above rule governs the present case because the ethical dilemma faced by Mr. Devine, now a public officer, arose out of his previous private practice. Rule 1.7, according to the State, governs attorneys in private firms. (*Resp't's Alternative Mot. and Resp. to Pet.* at 21-22).

Citing the "plain language" of Supreme Court Rule 1.11(c), the State contends the State's Attorney can delegate work to other attorneys in his office despite the fact that he participated personally and substantially in the Burge matter. (*Resp't's Alternative Mot. and Resp. to Pet.* at 21). According to this logic, the State's Attorney reacted to this

court's April 24, 2002 order in accordance with the relevant rule – Supreme Court Rule 1.11(c). He acknowledged this court's April 24, 2002 order gave Burge a real interest in the litigation of Petitioners' cases. (*Resp't's Mot. for Clarification* at 6). He withdrew from any participation in or supervision of those cases. *Id.* at 5. Finally, he assigned Assistant State's Attorney Driscoll to stand in his stead and exercise full powers of supervision in all Burge Defendant cases. *Id.*

3. Personal Interest

Petitioners' second argument is that 55 ILCS 5/3-9008, otherwise known as the Special State's Attorney Statute, requires appointment of a Special State's Attorney because the entire Cook County State's Attorney's Office has a personal interest in Petitioners' cases. (*Pet. and Resp. to Mot. for Clarification* at 54-58). The Special State's Attorney Statute requires disqualification of a State's Attorney if it is established that the State's Attorney is interested in a proceeding that he has a duty to prosecute. 55 ILCS 5/3-9008. Petitioners direct the court's attention to the "extensive and involved history" between the State's Attorney's Office and Area 2 cases to find an interest sufficient to trigger disqualification. (*Pet. and Resp. to Mot. for Clarification* at 55).

Specifically, Petitioners allege the State's Attorney's Office possesses two disqualifying interests. First, the reputation of the office would suffer if allegations of torture in individual cases were sustained. *Id.* Second, results of the investigation conducted by the Special Prosecutor, empowered by this court's April 24, 2002 order, "may subject Assistant State's Attorneys to criminal or ethical sanctions, creating an undeniable incentive in these cases to continue to aggressively resist any and all efforts" to properly investigate allegations of torture in Area 2 cases. *Id.*

The State replies the State's Attorney and his office lack the statutorily required interest in Petitioners' cases needed to trigger the appointment of a Special State's Attorney. (*Resp't's Alternative Mot. and Resp. to Pet.* at 9). Calling appointment of a Special State's Attorney a "drastic remedy," the State argues the statutorily required interest attaches to the State's Attorney if: 1) the defendant is a former client (this constitutes a *per se* conflict); or 2) specifically pled facts demonstrate that a State's Attorney's close relationship to an individual might cause him to not properly prosecute that individual. *Id.* at 10, 12.

The State believes the present case does not meet the above criteria. Unlike the set of facts that compelled this court to appoint a Special Prosecutor on April 24, 2002, Burge is not a potential defendant in Petitioners' cases. As to any specifically pled facts to support Petitioners' belief that the State's Attorney's Office is incapable of properly litigating their cases, the State finds none. The State's Attorney characterizes Petitioners' allegations as a non-specific "piece of literature which counterpoints a long litany of allegations respecting police misconduct, many concerning defendants not pending in these proceedings, alongside a personnel history of the State's Attorney's Office." *Id.* at 13.

4. Appearance of Impropriety

The third and final major argument Petitioners make to support the appointment of a Special State's Attorney is the following: removing the State's Attorney and his office from the litigation of Petitioners' cases is necessary to avoid appearances of impropriety. After citing the well-known ethical duty of prosecutors to avoid the appearance of bias or impropriety, Petitioners articulate two ways in which the State's

Attorney, by participating in the litigation of Petitioners' cases, contributes to such an appearance. First, Petitioners cite the admission by the State (discussed above) as evidence that the State's Attorney's Office's continued involvement in Petitioners' cases, in and of itself, gives rise to an appearance of impropriety. In the Motion for Clarification, the State writes about possible problems of perception related to prosecutorial decisions in Petitioners' cases:

> On the one hand, decisions not to call Burge as a witness, or to move for a decision without an evidentiary hearing, may be seen as decisions to protect Burge if the decision is commanded or controlled by Burge's former attorney. On the other hand, decisions to pursue evidentiary hearings or call all detective witnesses to the stand, could be seen as unusually aggressive tactics to avoid such charges at the cost of achieving justice in the individual case.

(*Resp't's Mot. for Clarification* at 4). The above statement, Petitioners argue, constitutes a concession by the State's Attorney that "every tactical decision he might make in handling Petitioners' cases is likely to be called into question." (*Pet. and Resp. to Mot. for Clarification* at 59). Petitioners believe such questioning is *prima facie* evidence of an appearance of impropriety.

Second, Petitioners contend the failure of the State's Attorney and his office to take action in response to Area 2 torture claims gives rise to an appearance of impropriety. (*Pet. and Resp. to Mot. for Clarification* at 60). This argument rests on the contention that the State's Attorney's Office failed to take action in response to the torture claims. Petitioners support this claim by arguing "absolutely no evidence" exists that Mr. Devine or any of his predecessors "conducted a full, objective review of the cases that are tainted by the Area 2 scandal." *Id.* at 61.

The State denies any allegations of inaction and then argues it removed the only potential appearance of impropriety by the withdrawal of State's Attorney Devine from any supervision of Petitioners' post-conviction proceedings. (*Resp't's Alternative Mot. and Resp. to Pet.* at 24-25). The State denies that every tactical decision in relation to the litigation of Petitioners' cases might be called into question. *Id.* at 24 (*quoting Pet. and Resp. to Mot. for Clarification* at 59). Instead, the State claims, its concession involved only "one, limited potential appearance of impropriety – the decision whether to call Burge as a witness...." *Id.* The State emphasizes not past concessions but its interpretation of present-day reality. Namely, the State's Attorney eliminated this apparent problem by delegating the litigation of Petitioners' cases to Assistant State's Attorney Driscoll. *Id.*

II. Analysis

A. Intervention

In considering the State's objection to Defendant Petitioners intervention, the court is mindful of the purpose of the intervention doctrine. Intervention expedites litigation by disposing of the entire controversy in one action. Intervention statutes, therefore, are remedial and ought to be liberally construed. *Adams v. County of Cook*, 86 Ill. App. 3d 68 (1st Dist. 1980); *Univ. Square, Ltd. v. City of Chicago*, 73 Ill App. 3d 872 (1st Dist. 1979).

The Code of Civil Procedure states, "Upon timely application anyone may in the discretion of the court be permitted to intervene in an action...when an applicant's claim or defense and the main action have a question of law or fact in common." 735 ILCS

5/2-408. Petitioners' claim – that this court's April 24, 2002 order requires the appointment of a second Special State's Attorney to litigate Petitioners' post-conviction matters – has more than a question of law or fact in common with the main action. Petitioners' claim is inextricably bound to this court's decision as to whether or not its April 24, 2002 order needs clarification. Therefore, this court holds that its earlier ruling allowing intervention was properly granted.

B. Petition for the Appointment of a Special State's Attorney

When considering requests for appointment of a Special State's Attorney, the relevant statutory provision, 55 ILCS 5/3-9008, provides:

> Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding...

Id. A court's authority to appoint a Special State's Attorney will arise when the appointment is necessary to "prevent a failure of justice" and to protect the due process rights of the citizens of this state. *Wilson v. County of Marshall*, 257 Ill. App. 220, 226 (2d Dist. 1930); *In re Appt. of Special State's Attorneys*, 42 Ill. App. 3d 176, 182 (3d Dist. 1976); *In re Special Prosecutor*, 164 Ill. App. 3d 183, 186 (5th Dist. 1987).

The appointment of a Special State's Attorney is wholly within the discretion of the court. However, before a court can exercise this power of appointment, the court must inquire whether or not "the legal contingency has arisen authorizing the exercise of such power." *Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, 502 (1910); *Hutchens v. Wade*, 13 Ill. App. 3d 787, 789 (4th Dist. 1973).

In its April 24, 2002 order, this court found a legal contingency sufficient to authorize its appointment of Special Prosecutor Egan and Assistant Special Prosecutor Boyle. The contingency consisted of a finding that, at least as to any investigation of police officers at Area 2 and later Area 3 during the period from 1973 to the present, State's Attorney Devine is an interested party as defined by Illinois law. (*In re Appointment of Special Prosecutor,* No. 2001 Misc. 4, April 24, 2002 at 7-8).

This finding of interest found its foothold in *People v. Coslet*, 67 Ill. 2d 127 (1977). The Illinois Supreme Court used *Coslet* to craft a "*per se*" conflict of interest rule that applies to situations in which an absolute, disabling conflict exists, thereby removing the necessity to prove prejudice. *Id.* at 133. After emphasizing similarities between State's Attorney Devine's relationship with Commander Burge and the fact pattern found in *People v. Courtney*, 288 Ill. App. 3d 1025, 1034 (3d Dist. 1997)(which held a *per se* conflict exists and Special State's Attorney should be appointed where a defense attorney who earlier represented defendant is appointed State's Attorney during defendant's prosecution), this court found that the State's Attorney "labors under a *per se* conflict of interest which necessitates the appointment of a Special Prosecutor to investigate the allegations made by [P]etitioners." (*In re Appointment of Special Prosecutor,* No. 2001 Misc. 4, April 24, 2002 at 8).

In the present case, however, no *per se* conflict exists. Unlike the situation in which the State's Attorney and his office might investigate and prosecute Burge, who was State's Attorney Devine's former client, this court is now asked to appoint a Special State's Attorney to litigate Petitioners' post-conviction proceedings. No one alleges Mr. Devine or any member of his office maintained an attorney-client relationship with

Petitioners. To the contrary, the State's Attorney's Office successfully prosecuted Petitioners and continues to litigate Petitioners' post-conviction proceedings.

Although no *per se* conflict exists, the court must examine potential conflicts that might arise if the State's Attorney or members of his office continue litigating Petitioners' post-conviction proceedings. Immediately after this court's April 24, 2002 order appointing a Special Prosecutor, the State's Attorney "recused himself from all cases involving Burge Defendants, as well as any which might arise in the future through clemency, habeus corpus, or other post-conviction proceedings. The State's Attorney has assigned Assistant State's Attorney Patrick Driscoll to stand in his stead and exercise full powers in the supervision of all Burge Defendant cases." (*Resp't's Mot. for Clarification* at 4). The State's Attorney's recusal changed the nature of the ethical inquiry. Instead of asking whether or not State's Attorney Devine labors under an actual conflict in relation to litigating Petitioners' post-conviction proceedings, this court must ask whether or not Assistant State's Attorney Driscoll might labor under such a conflict.

The answer to the preceding question depends upon two factors: 1) whether or not State's Attorney Devine might have labored under an actual conflict had he maintained involvement in Petitioners' post-conviction proceedings; and 2) if State's Attorney Devine would have labored under such a conflict, whether the ethical screens he instituted after this court issued its Aril 24, 2002 order prevent those possible conflicts from extending to his assistants.

The facts of each case guide the court when determining if a conflict of interest exists. The court recognizes that facts elicited during Petitioners' future post-conviction proceedings could potentially create an actual conflict for the State's Attorney's Office.

The consideration of possible future conflicts promotes judicial economy by expediting the resolution of these matters. Instead of staging an evidentiary hearing to determine whether an actual conflict exists in the post-conviction proceeding of each individual Petitioner, this court believes it prudent to anticipate and dispose of any future questions of conflict.

State's Attorney Devine may have labored under a conflict had he maintained any involvement in Petitioners' post-conviction proceedings. As noted, the State, not Petitioners, first argued that this court's April 24, 2002 order gave Burge a limited, but real interest in any Area 2 case which might still go to an evidentiary hearing and require Burge's testimony. *Id.* at 4, 6; *Resp't's Reply to Pet.'s Resp., Nov. 6, 2002* at 9). The State presented its ethical dilemma in clear terms:

> On the one hand, decisions not to call Burge as a witness, or to move for a decision without an evidentiary hearing, may be seen as decisions to protect Burge if the decision is commanded or controlled by Burge's former attorney. On the other hand, decisions to pursue evidentiary hearings or call all detective witnesses to the stand, could be seen as unusually aggressive tactics to avoid such charges at the cost of achieving justice in the individual case.

(*Resp't's Mot. for Clarification* at 4). In the above statement, the State admits that in post-conviction proceedings where Petitioners allege misconduct by Burge, the State's Attorney might have to refute those allegations by defending Burge's conduct. Having to decide whether or not to defend Burge's conduct, while that very conduct is the subject of an investigation creates, at minimum, a clear ethical quandary and, at worst, an actual conflict of interest.

The ethical screen instituted by State's Attorney Devine does not prevent the potential conflict from extending to his assistants. In an effort to shield his assistants

from the conflict, the State's Attorney recused himself from Petitioners' post-conviction proceedings and delegated supervision of those matters to Assistant State's Attorney Driscoll. This attempt at establishing a proverbial "Chinese Wall," however, came too late. Prior to State's Attorney Devine's recusal, several Assistant State's Attorneys, while under Devine's supervision, were litigating Petitioners' post-conviction proceedings. Patrick Driscoll was employed by the State's Attorney's Office during this pre-recusal litigation of Petitioners' post-conviction matters. Thus, the potential for conflict already took root within the State's Attorney's Office before State's Attorney Devine's recusal.

In recognition of the potential ethical dilemma, the State informed this court in its Motion for Clarification that it contacted the Illinois Attorney General's Office and asked that it be prepared to undertake supervision of Petitioners' post-conviction matters. (*Resp't's Mot. for Clarification* at 5). This court notes that among the duties of the Attorney General, the Illinois legislature has included "[t]o appear for and represent the people of the state before the supreme court in all cases in which the state or the people of the state are interested." 15 ILCS 205/4; *see also* Il. Const. Art. V. § 15.[3]

In its discretion and in order to avoid having the ancillary issue of conflict litigated in each of Petitioner's post-conviction proceedings, this court hereby orders the Attorney General's Office, pursuant to its duty under 15 ILCS 205/4, to consult with the State's Attorney and, when "the interest of the state requires,...attend the trial of any

[3] Historically, the Attorney General has permitted the Cook County State's Attorney's Office to appear as co-counsel on appeals of capital cases, all of which are heard by the Illinois Supreme Court.

party accused of crime, and assist in the prosecution," to assume complete responsibility for any subsequent litigation of Petitioners' post-conviction proceedings.

Recently elected by a clear majority of the citizens of Cook County,[4] Illinois Attorney General Lisa Madigan is personally free from any history of involvement in Petitioners' cases and will not be subject to any conflict of interest concerns.

II. Motion To Transfer Post-Conviction Matters To Judges Outside Cook County

A. Arguments

In addition to their request that a Special State's Attorney be appointed to litigate their individual post-conviction proceedings, Petitioners contend that their post-conviction matters should be transferred to judges sitting outside of Cook County. This request is based upon a statement of facts in which Petitioners allege that: 198 sitting Cook County judges are former Assistant State's Attorneys, 52 of which had direct involvement in the Area 2 cases; 41 judges are former Assistant Corporation Counsel, 8 of which had direct involvement in the Area 2 cases; 22 judges are former Assistant Attorneys General; 27 judges are former attorneys with "Other Law Enforcement" agencies, 2 of which had direct involvement in the Area 2 cases; and 37 judges are former law enforcement officers. Petitioners further allege that this past employment will require several judges to appear as witnesses in their various pending post-conviction proceedings.

[4] This court takes judicial notice of the official polling records which indicate that Attorney General Madigan received over 76% of the votes cast in the City of Chicago and over 63% of the votes cast in Cook County.

Because some judges would be required to evaluate the credibility of these testifying judges, Petitioners contend that there exists "an undeniable impetus for, and pressure on, sitting Cook County felony court judges, whether or not they were ever ASAs themselves, to protect their colleagues, who are former ASAs and who are presently sitting judges. Additionally, a number of the non-former ASA judges have close personal and professional relationships with judges who were former ASAs, as well as with present and former ASAs." (*Pet'rs' Pet. To The Chief J. To Req. That The Ill. S. C. Reassign The Above-Entitled Cases To Judges Sitting Outside Of Cook County, July 22, 2002* at 6).[5]

The only way to insure that these matters will be conducted free of any conflict of interest or even the appearance of impropriety, Petitioners' contend, is to remove all Cook County judges from presiding over their post-conviction proceedings. Specifically, Petitioners request that this court, in its supervisory authority, either request that the Illinois Supreme Court reassign these cases to judges sitting outside of Cook County or, in the alternative, conduct an evidentiary hearing "with full discovery rights, in order to determine the breadth and scope of the conflict and appearance of impropriety." (*Pet'rs' Pet. to Reassign* at 7).

The State, conversely, argues that allegations of judicial prejudice must be timely and specific. Without specific allegations of prejudice brought against individual judges in motions for change of venue or substitution of judge, the State contends that Petitioners' claims are nothing more than conclusory allegations based on speculation. The State further observes that these various post-conviction proceedings have been

[5] Hereafter cited as "Petition to Reassign."

pending before judges in the Criminal Division of the Circuit Court of Cook County for months, even years, without complaint from any of the individual Petitioners. Finally, the State argues that Petitioners have no standing to litigate these issues under one, unified petition. Rather, the State claims, the instant petition involves several individual cases with unique facts and procedural histories.

In their reply,[6] Petitioners argue that their petition is not subject to traditional principles of waiver because it is not a traditional motion for change of venue, substitution of judge, or recusal. Rather, Petitioners claim that their request for the reassignment of these post-conviction proceedings arises out of an extraordinary group of cases that require extraordinary relief. Essentially, Petitioners allege that that the public cannot have confidence in rulings "issued by a judiciary that labors under an undeniable appearance of partiality and conflict" because: (1) several judges are former Assistant State's Attorneys who were participants or supervisors in the Area 2 and 3 investigations; (2) the remaining judges have close personal and professional relationships with the judges who are former Assistant State's Attorneys; and (3) the Cook County judiciary maintains a "reputational stake" in the defeat of the claims against Area 2 and 3. (*Petitioners' Reply* at 1-2). Petitioners assert that, as a result of these extraordinary circumstances and the appearance of impropriety draped over the judiciary of Cook County, the rules of professional conduct and principles of due process require that these cases be reassigned to judges outside of Cook County.

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[6] Petitioners' *Reply In Support Of Petition To The Chief Judge To Request That The Illinois Supreme Court Reassign Cases To Judges Who Sit Outside Cook County* is cited as "Petitioners' Reply."

B. Analysis

Initially, this court addresses the State's claim that Petitioners' motion is untimely. The State is correct when it argues that the post-conviction matters involved in the instant petition have been pending for months, some even years, and that judges in many of them have made substantive rulings. However, the waiver rule may be relaxed "when both the right of a defendant to an impartial trial and the duty of the court to avoid any appearance of impropriety are implicated." *People v. Eubanks*, 307 Ill. App. 3d 39, 41 (3d Dist. 1999); *People v. Lopez*, 187 Ill. App. 3d 999, 1007 (1st Dist. 1989); *People v. Austin*, 116 Ill. App. 3d 95, 101 (2d Dist. 1983). Since the issue of the appearance of propriety of the Cook County judiciary is the fundamental issue underlying the instant petition, it is prudent to disregard principles of waiver in this matter. Thus, the fundamental inquiry is: whether the history of employment and professional relationships of the judiciary of Cook County creates an appearance of impropriety.

Illinois Supreme Court Rule 63 requires that "A Judge Perform the Duties of Judicial Office Impartially and Diligently." 134 Ill. 2d R. 63. In pertinent part, subsection (C) proscribes:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy (provided that referral of cases when no monetary interest was retained shall not be deemed an association within the meaning of this subparagraph) or, for a period of seven years, following the last date on which the judge represented any party to the controversy while the judge was an attorney engaged in the private practice of law;

* * *

134 Ill. 2d R. 63(C)(1)(a), (b) and (c).[7]

Clearly, a judge's "impartiality might reasonably be questioned" when the judge is likely to be called as a material witness in the same case over which he[8] presides. *People v. Ernest*, 141 Ill. 2d 412, 423 (1990). Thus, the law requires that a judge disqualify himself if the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." 134 Ill. 2d R. 63(C)(1)(a). Similarly, it is well settled that a judge must be disqualified when the judge has previously acted as counsel in the matter over which he now presides. *Austin*, 116 Ill. App. 3d at 100; 134 Ill. 2d R. 63(C)(1)(b). There can be no question, therefore, that if any of the individual petitioners in the instant matter has a case pending before a Cook County judge who either acted as counsel in the matter which is the subject of the post-conviction petition or who is likely to be a material witness in that post-conviction proceeding, those petitioners would be entitled to the recusal of that judge.

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[7] Canon 3E of the American Bar Association's Model Code of Judicial Conduct contains language nearly identical to subsections (a) and (b) of Rule 63(C)(1). The language in subsection (c) of Rule 63(C)(1), however, is not included in and reaches beyond the restrictions of the Model Code.

[8] The court's use of masculine pronouns denotes all Cook County judges.

However, cases in which a judge had a more tenuous involvement in the proceedings have not required the judge's recusal. The mere fact that a sitting judge was once an Assistant State's Attorney, or even a supervisor in that office, has been held not to create an appearance of impropriety. *People v. Storms*, 155 Ill. 2d 498, 506 (1993); *People v. Del Vecchio*, 129 Ill. 2d 265, 277 (1989); *People v. Vasquez*, 307 Ill. App. 3d 670, 673 (2d Dist. 1999); *Eubanks*, 307 Ill. App. 3d at 42; *People v. Phinney*, 250 Ill. App. 3d 858, 861 (4th Dist. 1993); *People v. Thomas*, 199 Ill. App. 3d 79, 91 (2d Dist. 1990). In *Thomas*, the defendant moved for substitution of judge for cause based on the fact that the judge in the case had been chief of the criminal division of the DuPage County State's Attorney's Office prior to becoming a judge. Defendant observed that the judge had supervisory authority over the Assistant State's Attorney prosecuting the defendant's case for a period of six months before he became judge. Defendant argued that Rule 63 (C)(1)(b) required that the judge recuse himself. The defendant also relied on *Austin*, which held that the trial judge "acted as counsel" and should have recused himself when he represented the defendant at her preliminary hearing in the same case over which he later presided. 116 Ill. App. 3d at 100. The *Thomas* court distinguished *Austin*, however, holding that, because the judge's involvement in the case, "if any," was merely supervisory in nature, he cannot be said to have "acted as counsel" as prohibited by Rule 63 (C)(1)(b). *Thomas*, 199 Ill. App. 3d at 91; *see also Del Vecchio*, 129 Ill. 2d at 278; *FDIC v. O'Malley*, 249 Ill. App. 3d 340, 364 (1st Dist. 1993).

Likewise, it has been held that a judge is not required to recuse himself simply because the judge was an Assistant State's Attorney during the time in which one of his colleagues prosecuted the defendant. In *Eubanks*, the Illinois Appellate Court held that

"the phrase 'in the private practice of law' as it is used in Supreme Court Rule 63(C)(1)(c) does not apply to those attorneys employed by the State's Attorney's office." 307 Ill. App. 3d at 42. The court reasoned "[t]here are significant and substantial differences between practicing law as an assistant State's Attorney and practicing law in the private sector." *Id.* Specifically, the reviewing court observed that a judge's impartiality might reasonably be questioned where the judge had a recent economic relationship with a private firm or where one of the judge's former clients is a litigant before the court — "concerns [which] do not attach to a judge...who was previously employed by the government as a prosecuting attorney." *Id.*

In the instant matter, Petitioners allege that an appearance of impropriety arises out of the fact that several Cook County judges were Assistant State's Attorneys at the time Petitioners' cases were being prosecuted. However, as in *Thomas*, the judges' former positions as Assistant State's Attorneys do not by themselves create an appearance of impropriety. Unless the judges actively prosecuted Petitioners at the trial stage, their mere employment as Assistant State's Attorneys, even if supervisory in nature, cannot be said to constitute acting "as counsel" as described in Rule 63 (C)(1)(b). Furthermore, the mere fact that many judges in Cook County worked in the State's Attorney's Office during the same period when their colleagues were prosecuting Petitioners does not mean that they were "associated in the private practice of law" as proscribed by Rule 63 (C)(1)(c). It also stands to reason, then, that no appearance of impropriety exists for those judges who were not employed by the Cook County State's Attorney's Office and had not acted as counsel in any of Petitioners' cases.

Petitioners also claim that an appearance of impropriety arises out of the fact that the judges presiding over the various post-conviction proceedings will be required to evaluate the credibility of other judges who will likely be called as witnesses in those matters. Petitioners rely on "numerous cases with less compelling fact situations in which a presiding judge has asked the Illinois Supreme Court to reassign a case to a judge outside the County, where there was a perception of conflict." (*Pet'rs' Pet. to Reassign* at 20). Specifically, Petitioners cite: *Pucinski v. Keithly*, 99 D 04033 (wherein Chief Judge O'Connell held that where the Clerk of the Circuit Court of Cook County was a party to a divorce proceeding the case should be assigned to a judge outside of Cook County to avoid suspicion); *People v. Vosburgh*, 96 CF 2586-96 and *In re Appointment of a Special Prosecutor*, 95 MR 807 (in which the Chief Judge of the Eighteenth Circuit requested that two judges from outside of DuPage County be assigned to preside over cases against two former DuPage County prosecutors, one of whom was a sitting judge); *People v. Foxgrover*, 91 CR 1775, 91 CR 24394, 91 CR 24396 (wherein the Chief Judge of Cook County requested that the criminal trial of a sitting judge be assigned to a judge from outside of Cook County); *In re Baby T* (in which the adoption dispute involving Appellate Court Justice Anne Burke was assigned to a non-Cook County judge); *People v. Moore*, 159 Ill. App. 3d 850 (1st Dist. 1987) (wherein the Illinois Supreme Court reassigned the case of a defendant charged with the murder of a Cook County judge to a judge from outside of Cook County); *Keehner v. Staley Mfg. Co.*, 50 Ill. App. 3d 258 (5th Dist. 1977) (holding that under the facts of the case, it was error to grant a motion for change of venue but the error was deemed harmless); and other various federal and state cases.

Additionally, this court makes note of the fact that it recently transferred two cases to judges outside of the Criminal Court Building at 26th Street and California, in Chicago. However, in those cases, as in the cases cited by Petitioners, a judge or public official was a party to the litigation or the victim of a crime. Because a judge — or the Clerk of the Circuit Court in *Pucinski v. Kiethly* — actually had a personal stake in the outcome of the proceedings, the court in each of these cases found it prudent to transfer the case to another judicial circuit either through a change of venue or a request for reassignment by the Illinois Supreme Court.

It should be noted, however, that such action is not required. In *Faris v. Faris*, 142 Ill. App. 3d 987 (2d Dist. 1986), a divorced husband and wife sought to modify their divorce decree. The matter was set for trial and the wife sought a change of venue. The wife claimed that she would not receive a fair trial in the circuit because the judges would be partial to her husband because of his personal and professional relationship with them both as an attorney and recently appointed judge. On appeal, the court observed that, "while judges in Illinois are subject to the standards of judicial conduct, the standards do not specifically address the issue before [the court] or suggest impropriety in hearing a case in the circuit in which a judge is a party." *Faris*, 142 Ill. App. 3d at 996. Thus, the reviewing court held that the mere fact that the judge was a party to the case did not create a *per se* appearance of impropriety.

Unlike the cases cited in Petitioners' motion, the judges involved in this case are not parties to the post-conviction matters that are the subject of the instant petition. They are merely potential witnesses. Like the court in *Faris*, this court has not found, nor have Petitioners cited, any case that stands for the proposition that an appearance of

impropriety is created merely because one judge is required to evaluate the credibility of another judge.

While the law may be silent on this specific factual situation, it is clear that the law presumes judges to be impartial. It has been held that "[a] trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice." *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). "The mere fact that the judge has some kind of relationship with someone involved in the case, without more, is insufficient to establish judicial bias or to warrant a judge's removal from the case." *People v. Steidl*, 177 Ill. 2d 239, 264 (1997). Additionally, "the fact that a judge has ruled adversely to a party...does not disqualify that judge from sitting in subsequent civil or criminal cases in which the same person is a party." *People v. Vance*, 76 Ill. 2d 171, 178 (1979). Thus, it is clear that there is little support for Petitioners' contention that an appearance of impropriety necessarily arises out of the fact that some judges will be required to evaluate the credibility of other judges.

Despite the lack of specific supporting case law, Petitioners argue that the severity of the allegations and the serious nature of the ongoing investigation into police conduct at Areas 2 and 3 requires that this court exercise its discretion and supervisory authority to request that the Illinois Supreme Court reassign the cases to another judicial circuit. This argument is based on Petitioners' desire to maintain absolute public confidence in the integrity of the judicial process involving these cases.

This court agrees that public confidence in the judiciary is of significant importance. However, the court disagrees that removing the cases from the judiciary of Cook County is the best way to foster such confidence. The best remedy for any

perceived lack of faith is to allow the judges of this jurisdiction to preside over these matters with diligence and impartiality, as they have sworn to do. The removal of Petitioners' cases from Cook County would, in essence, be an acknowledgement that the judges therein are incapable of fulfilling their duty. This court declines to draw such a conclusion.

Furthermore, confidence in the judiciary is only one of several considerations, which this court must balance. The court also has a duty to ensure that every individual defendant who is prosecuted in this county be afforded the rights guaranteed him by the laws of this country and the State of Illinois. To grant Petitioners' motion would be to ignore that obligation. Essentially, Petitioners seek to receive a remedy that exists outside the law merely because they allege similar facts in their post-conviction petitions. Implicit in Petitioners' argument is the notion that their rights as a group exceed the rights available to any individual defendant. It is clear from the case law discussed above that an individual defendant is not entitled to a change of venue or substitution of judge merely because the judge presiding over his case is a former Assistant State's Attorney or because another judge who is a former Assistant State's Attorney will be called as a witness. Although Petitioners insist the nature of these extraordinary cases warrant extraordinary remedies, this court is not persuaded that it should provide relief that is unavailable to any other individual defendant. It is not unusual at 26th and California for judges to be called as witnesses in cases on which they worked as Assistant State's Attorneys. If this court were to adopt Petitioners' theory, fairness would dictate that every defendant would be entitled to have his case transferred out of Cook County when a judge is called as a witness. This court declines to adopt a *per se* standard of transfer.

Finally, while, as noted earlier, this court rejected the State's contention that Petitioners' claims are procedurally waived, it does take notice of the fact that Petitioners did not raise any of their arguments regarding an alleged appearance of impropriety until now. Petitioners treaded through various stages of post-conviction litigation without objection to the judges presiding over their cases. Take the case of former petitioner Patterson,[9] for example. The Illinois Supreme Court remanded his case for an evidentiary hearing on August 10, 2000.[10] During the nearly two years which preceded the filing of the instant motion, Patterson and his attorneys conducted extensive discovery and litigated one of two issues raised in his petition to final disposition — all before Judge Michael P. Toomin. Only after Judge Toomin denied one of Patterson's claims and after this court appointed a Special Prosecutor to investigate possible criminal charges against Area 2 detectives did Patterson take umbrage with Judge Toomin's appearance of partiality. Like Patterson, all of the Petitioners named in the instant petition have commenced post-conviction proceedings that have long been advancing through the stages of litigation. None of them, however, questioned the appearance of the judges' partiality until after this court appointed a Special Prosecutor on April 24, 2002.

In their oral argument, counsel for Petitioners stated that the appointment of a Special Prosecutor "raises the stakes" of the post-conviction matters by making "the determinations by the judges judging the credibility of judges more critical of [*sic*] because of their potential effect." (R. at 166). However, this court is not persuaded that

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[9] Former Governor Ryan's pardon of Patterson, Howard, and Orange rendered their initial inclusion in the Petition to Reassign moot.

[10] *See People v. Patterson*, 192 Ill. 2d 93 (2000).

its decision to appoint a Special Prosecutor is relevant to the fundamental question of whether or not the Cook County judiciary labors under an appearance of impropriety.

In sum, Petitioners fail to establish that an appearance of impropriety exists which would require this court to remove Petitioners' post-conviction matters from all judges sitting in the Circuit Court of Cook County. Consequently, Petitioners' request that this court ask the Illinois Supreme Court to reassign their cases is denied. Additionally, because Petitioners have failed to establish any legal basis for their claim that the judiciary of Cook County labors under an appearance of impropriety, their request for an evidentiary hearing on that claim is likewise denied.

III. Conclusion

For the reasons discussed above, Petitioners' motion for the appointment of a Special State's Attorney is hereby denied. However, in its discretion, this court directs the Illinois Attorney General to assume complete supervision of the defense of Petitioners' post-conviction matters.

Also, Petitioners' motion that this court request that the Illinois Supreme Court reassign their cases to judges sitting outside of Cook County is denied. Petitioners' alternative prayer for an evidentiary hearing on that motion is also denied.

JUDGE PAUL P. BIEBEL, JR.
APR 09 2003
Circuit Court - 1688

ENTERED: Paul P Biebel Jr 1688
Paul P. Biebel, Jr.
Presiding Judge
Criminal Division
Circuit Court of Cook County

DATED: April 9. 2003